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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-62

RAMIRO RUBEN RAMIREZ, Petitioner

vs.

UNITED STATES OF AMERICA

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR REHEARING OF RAMIRO RUBEN RAMIREZ

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PETITION FOR REHEARING

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The petitioner herein respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered October 12, 1971, and (2) granting this petition. As grounds for this motion, petitioner states the following:

1. The "Rule of Four" should not be followed in the case at bar.

The rule that four votes are necessary to grant petition for certiorari should not be followed where only seven Justices are on the Court to participate in the consideration of a petition. A rare occasion has caused petitioner's petition for certiorari to be denied by five Justices while Mr. Justice Douglas and Mr.

Justice Brennan were of the opinion that certiorari should be granted. Due process of law should require this Court to grant the petition for certiorari under these circumstances as petitioner did not have an opportunity to present his constitutional grounds to a full court. In the alternative, Ramirez' petition for certiorari should be reconsidered when this Court is at full strength again.

2. There are conflicts between Courts of Appeals on the issue presented herein.

The affirmance below ( 441 F. 2d 950 ) by the Fifth Circuit held that a defendant can be constitutionally cross-examined at his trial in regard to his failure to give an exculpatory statement to law enforcement officers after his arrest. This decision is in direct conflict with the case of UNITED STATES v NOLAN, 10 Cir. 1969, 416 F. 2d 588, not cited in petitioner's petition for certiorari, where it was held plain error to comment in closing argument that Nolan gave no exculpatory statement to officers until he testified at his trial. The Supreme Court of Ohio in STATE v STEPHENS, 1970 263 N.E. 2d 773, set out the same issue and held as follows:

> " When a defendant testifies in his own behalf are the protections against self-incrimination waived? May the prosecutor then comment upon the defendant's silence during any stage of the accusatorial process?

> * * * The right of silence, while singular in the constitutional grant, may be plural in application. That right, once invoked by an accused under accusation is not waived by reason of defendant testifying at the trial. "

The rule that where there are decisions in conflict between courts of appeal in regards to important constitutional questions, then certiorari should be granted, should be followed herein. See GILLISON v UNITED STATES, D.C.. 1968, 399 F.2d 586; FOWLE v UNITED STATES, 9 Cir. 1969, 410 F.2d 48; UNITED STATES v BRENSON, 6 Cir. 1969, 411 F.2d 1057, for cases in conflict with the Fifth Circuit opinion herein.

The instant case is of great importance to all lawyers, for must they now advise their clients that silence after arrest can be used against them by way of cross-examination? Should law enforcement officers now warn all accused of crime that their silence after arrest can be used to impeach them by way of cross-examination at a trial in the event they make an exculpatory statement for the first time at such trial? These striking questions merit review by this Court. The case at bar can only cause mass confusion in regard to Fifth Amendment rights to remain silent and the right of a defendant to testify in his own behalf. The fair administration of justice calls for this Court to tell lawyers now the correct rule of law in regards to the issue presented herein.

## CONCLUSION

For the reasons set forth above, as well as those contained in the petition for a writ of certiorari, petitioner prays that this Court grant rehearing of the order of denial, vacate the order, grant the petition and review the judgment and opinion below.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, John L. Fashing, one of the attorneys for the petitioner Ramiro Ruben Ramirez, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this the 2nd day of November, 1971, I served three copies of the foregoing Petition for Rehearing each, on the following:

1. On Mr. Ralph Harris, Assistant U.S. Attorney for the Western District of Texas

El Paso Division, by mailing him three copies of the same at his offices, Federal Courthouse Building, El Paso, Texas 79901.

2. On the United States by mailing three copies thereof in a duly addressed envelope with airmail postage prepaid to the Honorable Erwin Griswold, United States Solicitor General, United States Department of Justice, Washington, D. C.

John L. Fashing

John L. Fashing